



Federal Communications Commission
Washington, D.C. 20554

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DA 07-3382

Re: Petition for Rule Making filed by Icom America, Inc.

Dear Mr. Tilles:

By this letter, we deny the June 15, 2004, Petition for Rule Making ("Petition") filed by Icom America, Inc. ("Icom").¹ The Petition asks the Commission to begin a proceeding that seeks comment on the re-designation and related transfer of certain spectrum² in the 150 MHz band from the Public Mobile Radio Service ("PMRS")³ to the Public Safety Radio Service ("PSRS").⁴ We conclude on the record before us that Icom has not made a sufficient showing to support the commencement of a rulemaking. We therefore deny Icom's petition.

In its Petition, Icom contends that public safety ("PS") entities are "clamoring to add capacity to their systems" to remedy pervasive congestion in the 150 MHz band and that existing statutory and regulatory processes available to PS entities to augment spectrum in that band have been insufficient to remedy the problem. Icom requests that the Commission commence a rulemaking proceeding to re-designate what it describes as "fallow" spectrum in the 150 MHz band from PMRS to PSRS entities.⁵ Icom acknowledges that such a re-designation could hinder expansion by incumbent commercial operators and recent Economic Area ("EA") licensees in the 150 MHz band, but it suggests that those operations could be grandfathered. Icom also claims there has been "little interest" in this spectrum by commercial entities as indicated by the modest results from Auctions 40 and 48.⁶ Icom also asserts the recent change in the eligibility requirement for Part 22 spectrum is not sufficient to facilitate PS use of

¹ Icom America, Inc., Petition for Rulemaking (filed June 15, 2004). ICOM is a manufacturer of radio equipment for use by amateur radio, marine, aviation and land mobile operations. Petition at 1-3.

² Specifically, Icom asks the Commission to consider amending Sections 22.531, 22.561, and 90.20 of its rules, 47 C.F.R. §§ 22.531, 22.561, 90.20, to re-designate eighteen (18) paired and four (4) unpaired frequencies in the 150 MHz band from the PMRS to the PSRS.

³ The PMRS is part of the Public Mobile Services governed by Part 22 of the Commission's Rules and includes commercial paging services provided under both site-based and geographic area licenses.

⁴ The PSRS is part of the Private Land Mobile Radio Service (PLMRS) in Part 90 of the Commission's Rules. The PSRS is used by public safety entities for police and rescue services. We note that Icom requests a "reallocation" of the PMRS frequencies to public safety mobile use, but should have requested a re-designation of the service rules. Section 2.106 of the Commission's rules outlines the allocation in the band as available for fixed and land mobile use, but the band is designated for PMRS.

⁵ Icom Petition at 6-9. As examples of such "fallow" spectrum in the 150 MHz band, Icom identifies four Economic Area markets (Cincinnati, Indianapolis, Nashville, and Memphis) in which 29 paging licenses remain unsold from Auctions 40 and 48. Icom submits that a re-designation of these unsold channels from the PMRS to the PSRS would facilitate the creation of natural channel pairs by PS entities and would enhance interoperability within the PSRS. *Id.*

⁶ Icom Petition at 7-8.

these channels.⁷ Further, Icom asserts that the recent audit of paging licenses in the 150 MHz band shows that the number of available PMRS channels in that band has grown since its petition was filed.⁸

On January 27, 2006, the Wireless Telecommunications Bureau (Bureau) released a Public Notice seeking comments on the Icom Petition. The Bureau received initial comments from ten parties⁹ and reply comments from Motorola, Inc. (“Motorola”), and Icom. Of the twelve comments filed, ten support the Icom Petition. The AAPC and the Concerned Carriers oppose the Petition.

Supporters of the Icom Petition claim that PS entities are in need of additional 150 MHz band spectrum to expand their current communications systems.¹⁰ The supporters generally state that (1) spectrum congestion in their areas of operation is a hindrance that could be remedied by additional capacity in this band;¹¹ (2) the lack of standard pairing channels in the PSRS 150 MHz spectrum prevents the deployment of more efficient trunking systems;¹² (3) the 150 MHz range is more suitable to PS entities operating in rural areas than the 800 MHz band because it has better propagation characteristics, thus requiring less infrastructure to provide comparable coverage;¹³ and (4) the current Section 337(c) waiver process is too time consuming and burdensome for PS providers.¹⁴

Opponents of the Icom Petition acknowledge that in some specific areas, PS entities may benefit from additional 150 MHz spectrum, but they contend that Icom fails to show that PS entities generally are in need of greater capacity throughout the band.¹⁵ In this connection, they contend that Icom has not provided sufficient details to justify the re-designation of the channels to PSRS.¹⁶ Opponents insist that many entities did not bid on 150 MHz markets in Auctions 40 and 48 simply because of the encumbrance of site-based paging operations in those markets.¹⁷ They assert that PS entities already have sufficient access to Part 22 commercial spectrum pursuant to Section 337(c) and as a result of the recent relaxation of the eligibility requirements for Part 22 spectrum.¹⁸ As a procedural matter, Concerned Carriers claim the Icom Petition fails to comply with Section 1.401 of the Commission’s rules because it does not include either the text or substance of Icom’s proposed rule.¹⁹

⁷ Specifically, Icom asserts that “the Commission’s change in terminology in Section 22.7 [captioned “General eligibility”] of its rules to substitute the word ‘licensee’ for the words ‘common carrier’ does not create eligibility for public safety licensees for Part 22 frequencies.” Icom Reply at 2. For the reasons discussed below, we find that the Commission’s modification of the Part 22 rules makes it easier for PS entities to acquire Part 22 licenses. *See infra* notes 23 and 31 and accompanying text.

⁸ Icom Reply at 3 (*citing* Wireless Telecommunications Bureau Confirms Certain Licenses in the Paging and Radiotelephone Service and Certain Licenses Operating on 929-930 MHz Private Carrier Paging Exclusive Channels Terminated As a Result of Spectrum Audit, *Public Notice*, 20 FCC Rcd 4941 (WTB 2005)).

⁹ The ten commenters were: American Association of Paging Carriers (“AAPC”); Association of Public-Safety Communications Officials-International, Inc. (“APCO”); Chicago Fire Department; Concerned Part 22 Carriers (“Concerned Carriers”); Lexington Lafayette Urban County Government (“Lexington Lafayette”); National Public Safety Telecommunications Council (“NPSTC”); Northern California Chapter of the Association of Public Safety Communications Officials (“NCAPCO”); Quality Mobile Communications, LLC; Texas Department of Transportation (“Texas DOT”); and Wisconsin Department of Transportation.

¹⁰ *See, e.g.*, APCO Comments at 2-3; Texas DOT Comments at 2-3.

¹¹ *See, e.g.*, NCAPCO Comments at 3.

¹² *See, e.g.*, Lexington Lafayette Comments at 1. *See also* Icom Petition at 5-6.

¹³ *See, e.g.*, NCAPCO Comments at 2-3. *See also* Motorola Reply at 1.

¹⁴ 47 U.S.C. § 337(c). *See, e.g.*, Icom Petition at 8; NPSTC Comments at 3; Texas DOT Comments at 3; and Motorola Reply at 2-3.

¹⁵ *See, e.g.*, Concerned Carriers Comments at 5-6.

¹⁶ *Id.* 4-5.

¹⁷ *See, e.g.*, AAPC Comments at 2.

¹⁸ *See, e.g.*, Concerned Carriers Comments at 8-10.

¹⁹ 47 C.F.R. § 1.401. Concerned Carriers Comments at 4-5. Icom responds that its petition complies with Section 1.401 of the rules because it includes the substance of its proposed rule changes. Icom Reply at 4, n.2. A strict application of Section 1.401(c) of the Commission’s rules, 47 C.F.R. § 1.401(c) could lead to the dismissal of the

Based on the record before us, we deny the Petition for several reasons. First, the lack of contiguously available spectrum in the 150 MHz band is such that a wholesale re-designation of certain spectrum in the band as proposed by Icom would likely yield minimal benefits, while increasing the potential for harmful interference between public safety and commercial operations. We find that interleaving new site-based public safety operations with existing geographically-licensed paging services on these channels would likely create problems similar to those of adjacent-channel receiver overload caused by out-of-band emissions (“OOBE”) that contributed to the need for 800 MHz rebanding.²⁰ Second, none of the entities supporting the Icom Petition indicate that they have fully availed themselves of existing statutory and regulatory alternatives to the proposed rulemaking action. Finally, Icom’s proposal does not take into consideration how the public safety spectrum allocations at 700 MHz and 800 MHz will ease congestion for PS entities in the 150 MHz band.²¹ Nor does it address the increased availability of spectrum to PS entities due to recent spectrum audits²² and the ability to obtain spectrum through the secondary market.²³ We will address these matters in more detail below.

In response to the Petition, Commission staff has analyzed the spectrum covered by the channels identified by Icom and we conclude the spectrum is not sufficiently available to justify the steps needed to re-designate the subject spectrum to the PSRS.²⁴ As a result of an audit of the Part 22 150 MHz site-based paging licenses cited by Icom, approximately 718 licenses were terminated or canceled; however, many of the areas previously covered by these licenses reverted to the geographic licensees that won overlay rights in Auctions 40 and 48. In addition, many of the licenses that were unsold in Auctions 40 and 48 have areas of significant incumbency.²⁵ At the close of

Petition, as Concerned Carriers contend, for failure to “set forth the text or substance of the proposed rule...together with all facts, views, arguments and data deemed to support the action requested....” However, because the Petition identifies the specific rules proposed to be changed, details the nature of those changes, and explains their purposes, we find sufficient substance for interested parties to comment and for us to address the Petition. Accordingly, we decline to dismiss the Petition on these grounds.

²⁰ In March 2002, the Commission initiated a rule making proceeding to respond to growing concern that cellular-architecture 800 MHz land mobile and 800 MHz cellular systems were causing interference to public safety and other 800 MHz licensees using “high-site” architecture. See *Improving Public Safety Communications in the 800 MHz Band*, WT Docket 02-55, *Notice of Proposed Rule Making*, 17 FCC Rcd 7169 (2002); see also, *Improving Public Safety Communications in the 800 MHz Band*, WT Docket No. 02-55, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 FCC Rcd 14969 (2004) *erratum* 19 FCC Rcd 19651 (WTB PSCID 2004) and *erratum* 19 FCC Rcd 21818 (WTB PSCID 2004) (*Rebanding Report and Order*).

²¹ See Federal Communications Commission Requests Comment on Spectrum Needs of Emergency Response Providers, WT Docket No. 05-157, *Public Notice*, 20 FCC Rcd 7774, 7776 (2005). See also, *On the Study to Assess Short-Term and Long-Term Needs for Allocations of Additional Portions of the Electromagnetic Spectrum for Federal, State and Local Emergency Response Providers*, WT Docket No. 05-157, Report to Congress, 2005 WL 3618426 (F.C.C.), 37 Communications Reg. (P&F) 706, (submitted Dec. 19, 2005)(*2005 Report to Congress*).

²² See Wireless Telecommunications Bureau Lists Private Land Mobile Licenses Cancelled as a Result of the Spectrum Audit, *Public Notice*, 19 FCC Rcd 10100 (WTB 2004) (*Land Mobile Audit Notice*).

²³ Specifically, due to the removal of the eligibility requirement that Part 22 license holders be common carriers, PS entities may participate in the licensing process for the 150 MHz licensees, including obtaining licenses through the secondary market (e.g., leasing, partitioning and disaggregation of existing licenses). See Amendment of Part 22 of the Commission’s Rules to Benefit Consumers of Air-Ground Telecommunications Services, WT Docket No. 03-103, Biennial Regulatory Review – Amendment of Parts 1, 22, and 90 of the Commission’s Rules, WT Docket No. 05-42, *Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 4403, 4446-4447 (2005) (*Part 22 Report and Order*).

²⁴ Specifically, for each channel at issue, staff performed a nation-wide analysis and plotting of incumbent site-based and geographic licenses. While pockets of availability do exist, they are not consistently or widely available.

²⁵ Because incumbent paging operations in the 150 MHz band already had been licensed on a site-specific basis, in Auctions 40 and 48, the Commission made geographic “overlay” licenses available in this band (for 18 paired frequencies in 175 EAs (3150 “paired” licenses) and for 4 unpaired frequencies in those EAs (700 “unpaired” licenses)). Accordingly, incumbent site-based paging operators participating in these auctions could either obtain

Auction 48, 700 of the 3150 “paired” licenses (about 22%) and 234 of the 700 “unpaired” licenses (about 33%) remained held by the Commission. Our examination of the locations covered by the unsold licenses shows that most of the geographic areas covered by the licenses are heavily encumbered by site-based operations.²⁶ Moreover, while unsold and unencumbered channels can be found in some areas, there is no geographic uniformity of spectrum availability across the country or even significant numbers of markets that would be conducive to promoting interoperability for PS communications. This patchwork of “white space” would be of limited value particularly to PS entities operating in larger jurisdictions. While “natural” pairing of unsold PMRS channels with channels already allocated to PSRS might improve PSRS interoperability as Icom suggests, achieving this outcome is unlikely, particularly on any widespread basis, given the inconsistent pattern of channel-pair use across the country. This situation is further compounded by the fact that the available PMRS licenses are divided into EAs which may not align with public safety coverage needs.

In addition to the audit of the Part 22 150 MHz site-based paging licenses cited by Icom, there is a second spectrum audit that also is relevant here.²⁷ As a result of a separate audit of licenses in the PLMRS, including but not limited to PSRS licenses in the 150-174 MHz band, the Bureau terminated thousands of VHF public safety licenses, thus freeing up those channels for re-licensing.²⁸ Because these PLMRS bands are only licensed on a site-by-site basis, the spectrum covered by the terminated licenses did not revert to any geographic area licensees and are now available for re-licensing. Clearing unused authorizations from the Commission’s licensing database in this manner made more channels and areas available for assignment to PS entities seeking to operate in the 150-174 MHz band.

Even if there were sufficient spectrum available for PS, we nonetheless would decline to initiate a rulemaking because we find that Icom’s proposed redesignation of spectrum would increase the potential for harmful interference between public safety and commercial operations. To reduce the risk of co-channel and adjacent channel interference with PS radio operations, frequencies allocated to PS entities are generally separated from those allocated for commercial use. Because the paired PMRS channels at issue are all adjacent to each other, sharing of these channels in the 150 MHz band by both new PS entities and the incumbent high-powered paging or land mobile operations could give rise to harmful interference similar to the OOBE interference which causes the receiver overload²⁹ problems faced in the 800 MHz band, even with mandatory coordination and interference analysis. The difficulty of coordinating adjacent channel overload interference, for example, would be exacerbated by the fact that spectrum in the PSRS is licensed on a site-by-site basis and PMRS spectrum is licensed on a geographic basis. Moreover, practically speaking, given the widespread PMRS incumbency throughout the band, sharing of this band as suggested by Icom would make it difficult for PS agencies to enjoy even rudimentary interoperability when their personnel travel outside their jurisdictions to assist in disaster relief or at any time when they perform “talk-around” communications in an area that is assigned to a PMRS licensee. Icom does not acknowledge these interoperability issues in its petition.

the right to expand their existing operations in these geographic areas or face the risk that others would be able to obtain “overlay” licenses and operate around the incumbent’s existing operations. However, the result of such an overlay meant that many licenses were not sold because significant areas were already utilized by incumbent operations.

²⁶ For example, within the four EAs cited by Icom as candidates for its proposed spectrum re-designation, we found that only 5 of 22 licenses in the Cincinnati EA are both unencumbered and still with the Commission. In the other three EAs, the comparable numbers are 3 of 22 in both the Indianapolis and Nashville EAs and only 1 of 22 in the Memphis EA. See n.5, *supra*.

²⁷ See n.8, *supra*, and accompanying text regarding the audit cited by Icom.

²⁸ See *Land Mobile Audit Notice*, 19 FCC Rcd at 10100.

²⁹ In the 800 MHz rebanding proceeding, the Commission defined out-of-band emission interference (“OOBE interference”) as “signals invariably ‘spill[ing] over’ into adjacent spectrum.” Although filters can be effective in reducing OOBE interference, “they are less effective on frequencies close to the transmitter frequency; e.g., a filter may not be as effective in significantly reducing OOBE interference to a public safety receiver attempting to receive a signal on a channel immediately adjacent to the channel being used by a nearby [commercial paging operation].” *Rebanding Report and Order*, 19 FCC Rcd at 15023.

While Icom criticizes the special Commission waiver process authorized under Section 337(c) of Communications Act as “time consuming and overly burdensome,” this process is a valuable mechanism for PS entities to acquire unassigned non-PSRS spectrum. In addition to the Section 337 process, PS entities can also seek a conventional waiver under Section 1.925 of rules.³⁰ PS entities can also obtain 150 MHz band spectrum licensed to others through either partitioning and/or disaggregation or by lease in the secondary market. We also note that after Icom had filed its petition the Commission amended Part 22 of the rules by removing a requirement that PS entities obtain a waiver to be eligible to hold Part 22 licenses, thus making it easier for PS entities to acquire Part 22 licenses.³¹

The Commission is also taking steps to make considerable spectrum available to PS entities in the 700 MHz, 800 MHz, and 4.9 GHz bands.³² These bands are intended to increase communication options and interoperability for PS entities. As a result, many agencies may pursue relocating to the 700 MHz and 800 MHz frequencies to obtain increased functionality and interoperability. For those PS entities that remain in the 150 MHz band and desire to expand their operations, two important developments should enable them to obtain additional spectrum in that band. First, the migration of other PS entities from the 150 MHz band to the higher bands should “free-up” additional spectrum in the 150 MHz band. Second, while “narrowbanding” of the 150 MHz band to 12.5 kHz technology is not required to be completed until 2013, it should provide PS entities and others with more channels in that band as they replace old equipment with new equipment.³³

For the reasons outlined above, we are not persuaded by Icom’s Petition that commencement of a rulemaking proceeding to re-designate certain frequencies in the Part 22 150 MHz band from PMRS to PSRS is either required or consistent with the public interest.³⁴ Given the obstacles outlined above and the limited benefit of any re-designation of these channels, we conclude that the Petition fails to provide sufficient reason to commence a proceeding. Further, because neither Icom nor the commenters supporting its petition appear harmed by the application of the Commission’s current rules for the 150 MHz band, they have not demonstrated a need for modification of those rules, especially where modification of those rules would be of questionable benefit to the PS community and could increase the risk of harmful interference to PS communications.³⁵ Further, we find that the

³⁰ Where PS entities have needed additional spectrum outside the PSRS, they have often sought waivers from the Commission under both Section 337(c) of the Act and under Section 1.925 of the Commission’s rules. *See, e.g.,* Application of City of Burbank, CA, File No. 0001073667, *Memorandum Opinion and Order*, 18 FCC Rcd 23770 (WTB PSPWD 2003) (waiver requested and granted under Section 1.925); City of Summit, NJ, File No. 0001869696, *Order*, 20 FCC Rcd 16181 (WTB PSCID 2005) (waiver requested under both Section 337(c) and Section 1.925; waiver granted under former); City of Richmond, File No. 0002660203, *Order*, 21 FCC Rcd 14384 (PSHSB PD 2006) (granting in part and denying in part a request for waiver pursuant to Section 337(c) and Section 1.925).

³¹ *See Part 22 Report and Order*, 20 FCC Rcd at 4446-4447. Further, the Commission has clarified that PS eligibles could bid for non-PS spectrum: “We do not believe that it was Congress’s intent to forbid entities eligible to be licensed on public safety radio services from voluntarily participating in auctions for spectrum that is not exempted from our competitive bidding authority. Hence, we conclude that entities eligible for licenses in the public safety radio services are eligible to participate in auctions of other spectrum.” Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as Amended, WT Docket No. 99-87, *Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 22709, 22751(2000).

³² As outlined in the 2005 *Report to Congress* cited earlier, there is ninety-seven megahertz of spectrum currently allocated in support of communications by public safety service providers, including recent allocations in the 700 MHz, 800 MHz and 4.9 GHz bands. *See* n.21 *supra*.

³³ *See* Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as Amended, WT Docket No. 99-87, *Third Memorandum Opinion and Order, Third Further Notice of Proposed Rulemaking and Order*, 19 FCC Rcd 25045, 25053 (2004).

³⁴ *See* 47 C.F.R. § 1.407.

³⁵ *See* Edwards and Kelcey, Inc., Petition for Modification of Section 101.145 Interference to Geostationary Satellites from Point-to-Point Microwave Systems, RM-9830, *Memorandum Opinion and Order*, 22 FCC Rcd 873, 875 (WTB 2007) (because petitioner has “not established that it or other applicants have been harmed by the

rulemaking proceeding is not necessary given existing spectrum options in the 150 MHz band and existing regulatory options for obtaining non-PS channels. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 5(c)(i) of the Communications Act, as amended, 47 U.S.C. §§ 154(i) and 155(c)(i), and sections 0.131, 0.204(b), 0.331, 1.401 and 1.407 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.204(b), 0.331, 1.401 and 1.407, that the Petition for Rule Making filed by Icom America, Inc., on June 15, 2004, IS DENIED.

Sincerely,

Roger S. Noel
Chief, Mobility Division
Wireless Telecommunications Bureau

application of Section 101.145, it has not demonstrated a need for modification of this rule, especially where such modification could have a negative effect on interference protection of geostationary satellite systems”).